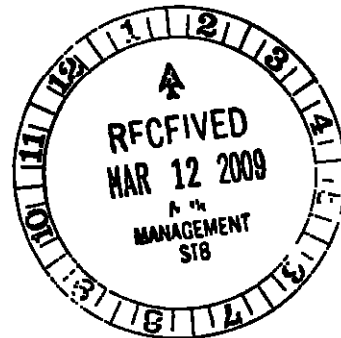


**ORIGINAL**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**



224673

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**STB Finance Docket No. 35219**

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**REPLY OF THE CHLORINE INSTITUTE INC. TO  
THE PETITION OF THE UNION PACIFIC RAILROAD  
COMPANY FOR A DECLARATORY ORDER**

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**ENTERED  
Office of Proceedings**

**MAR 12 2008**

**Part of  
Public Record**

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**Dated: March 12, 2009**

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**INTRODUCTION**

By Petition filed February 18, 2009, the Union Pacific Railroad ("UP") seeks to have the Board relieve it of its duty to provide rail service upon reasonable request to a shipper of chlorine on the ground that the destinations to which the shipper would move chlorine is already adequately supplied with chlorine from origins closer to the same destinations. While styled as a Petition for Declaratory Order seeking the Board's guidance, it is in effect a request for an exemption to the UP's common carrier obligations. The Petition does not and cannot meet the statutory criteria set forth at 49 U.S.C. § 10502 required for the grant of such an exemption. More importantly, the Petition is based on incomplete facts, as well as facts that are untrue and that the UP should know to be untrue. There is not an adequate supply of chlorine within the Texas, Louisiana Gulf coast Region, and the UP participates in many movements of chlorine

into these very destinations from distances well in excess of the 300 mile radius alleged by UP in its Petition

## **BACKGROUND**

The Chlorine Institute, Inc. (the "Institute") states on information and belief that the rates to the four destinations involved in the Petition were requested by the involved shipper, a member of the Institute, following the breakdown of contract negotiations between that shipper and the UP. The Institute further states on information and belief that the rates at issue were only part of a larger number of rates that were requested for the purpose of allowing the shipper to challenge the reasonableness of those rates in a rate proceeding before the Board. The UP, therefore, in refusing to quote rates to the Texas and Louisiana destinations involved has both assigned to itself the prerogative of allocating chlorine supplies, suppliers, and markets, while also divesting the Board of its authority to prescribe reasonable rates and divesting the shipper of its rights to be protected from the UP's abuse of market power

## **STATEMENT OF FACTS**

In its Petition, UP alleges that it refused to quote rates to Houston and Dallas, Texas and Allemania and Plaquemine, Louisiana because "all four of these destinations are located within 300 miles of ample alternate chlorine supplies." What UP does not disclose is that it routinely supplies chlorine to these very destinations from origins more than 300 miles away. For example, UP delivers 250,000 tons of chlorine per year to one of these destinations in a move that covers more than 800 miles. Plainly, if a receiver

requires that amount of chlorine from an origin 800 miles away, there is not an "ample alternate" supply of chlorine at the destination. This is merely an example. Chlorine routinely moves from Northeastern origins into the Gulf Region to meet the needs of customers in that Region. Obviously UP is well aware of these continuing movements, but has chosen to disregard their relevance to its Petition. In fact, there simply is not enough chlorine produced in the Gulf Region to meet demand. Some portion of Northeastern, Western and even Canadian production needs to be utilized to fulfill Gulf Coast demand. In addition, chlorine consumers located in the Gulf Region must have, and are entitled to have, alternate sources of product available to them to meet unforeseen contingencies such as weather disruptions, plant outages etc. Artificially limiting those alternative sources of supply is plainly unreasonable in a complex and changing chemical marketing economy.

### **ARGUMENT**

UP states that TSA and FRA policies seek to discourage the movement of chlorine by rail, but no such policies actually exist. In its presentation before the Board in Ex Parte No. 677 (Sub-No. 1) *Common Carrier Obligation of Railroads-Transportation of Hazardous Materials*, the Federal Railroad Administration made it very clear that it does not favor any reduction or revision of the railroads' common carrier obligations.

As the Board's June 4 notice points out, railroads have a common carrier obligation to transport hazardous materials and cannot refuse to provide this service merely because to do so would be inconvenient or unprofitable. While the railroads have expressed concern over this obligation, particularly with respect to their potential liability exposure arising from train accidents involving the release of poisonous by inhalation hazard or toxic

inhalation hazard (referred to as PIH or TIH) materials, DOT believes that there is no reason to change this common carrier obligation. Rail transportation of hazardous materials is currently very safe and DOT has been working with railroads, shippers, and tank car builders to make rail transportation of PIH and other hazardous materials even safer and more secure (Testimony of Clifford Eby, Deputy Federal Railroad Administrator at pages 1-2)

The competitive implications of allowing anyone to determine where and how chlorine can be marketed are well beyond the expertise of the Board. Allowing a railroad to effectively control the supply and demand of this vital material simply cannot be tolerated. The free market does and should determine where chlorine is produced and where it is consumed. To the extent that safety and security issues should somehow restrict chlorine movement that is a matter for the Congress, and has been delegated to the TSA and the FRA, not to the Board and certainly not to the UP.

### **CONCLUSION**

The Board has discretion to entertain the Petition here at issue, but cannot act on the Petition without an adequate factual record. Given the Petitioner's material misstatements of fact, the lack of appropriate jurisdiction of the Board to rule on the safety, security and competitive issues raised by the petition, and the inability of the Petitioner to meet the requirements for an exemption under the provisions of 49 U.S.C. § 10502, the Petition should be denied without further process or procedures.

The Petition cannot be granted or any order issued in favor of the UP with the outstanding factual controversy surrounding the Petition unsettled. Accordingly, should the Board determine that further procedures are warranted, the Institute would submit that the UP must be ordered to submit, under oath, that data and materials necessary to

support the various factual allegations in its Petition, that the Institute, the most directly affected shipper, and others be granted such discovery and cross-examination of witnesses as may be necessary and to test the validity of those factual allegations, and that opposing parties be permitted to submit such evidence as they may chose to rebut the claims made by the UP.

Respectfully submitted,



**Paul M. Donovan**  
**LAROE, WINN MOERMAN &**  
**DONOVAN**

*Attorney for*  
*The Chlorine Institute, Inc.*

**Dated: March 12, 2009**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**STB Finance Docket No. 35219**

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**CERTIFICATE OF SERVICE**

I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by LAROE, WINN, MOERMAN & DONOVAN, P L C., Attorneys for The Chlorine Institute, Inc., to print this document. I am an employee of Counsel Press.

On the 12<sup>th</sup> day of March 2009, I served 2 copies of the within **REPLY OF THE CHLORINE INSTITUTE INC. TO THE PETITION OF THE UNION PACIFIC RAILROAD COMPANY FOR A DECLARATORY ORDER** in the above captioned matter upon:

Tonya W. Conley  
Union Pacific Railroad Company  
1400 Douglas Street  
Omaha, NE 68179

**via Express Mail**

Unless otherwise noted, an original and 10 copies have been sent to the Board via hand delivery on the same date.

March 12, 2009

  
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John C. Kruesi, Jr.  
Counsel Press, LLC